BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CRAIG PHILIP HABIG Claimant	)	
VS.	)	Docket No. 1,059,916
CITY OF TOPEKA Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 1, 2012, preliminary hearing Order entered by Administrative Law Judge Rebecca A. Sanders. Matthew R. Bergmann, of Topeka, Kansas, appeared for claimant. Matthew S. Crowley, of Topeka, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant failed to sustain his burden of proof that he sustained personal injury by accident that arose out of and in the course of his employment. Accordingly, the requested workers compensation benefits were denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 27, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of the ALJ's finding that claimant failed to sustain his burden of proof that he sustained personal injury by accident that arose out of and in the course of his employment.

Respondent asks that the Board affirm the ALJ's Order.

The issue for the Board's review is: Did claimant suffer an injury that arose out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant has been a firefighter for respondent for almost 12 years. He is stationed at Station 9 and his rank is apparatus operator. His primary job is to drive the apparatus and, if he is at a fire, he operates the pump. If he is on a medical call, he provides medical care to the patient. His job involves lifting and heavy physical activity. As a firefighter, claimant works 24-hour shifts from 7 a.m. to 7 a.m. As a firefighter, his schedule is 24 hours on, 24 hours off, 24 hours on, 24 hours off, 24 hours on, 4 days off. When claimant is on duty, he has to live at the fire station. While on duty, he has certain job-related duties, after which he has down time when he can do what he wants, as long as he is ready to respond if his pager goes off. One of the activities available during down time is working out on the fitness equipment. Some of the firefighters work on their personal vehicles, watch television, or play cards.

Claimant testified that every day he was on duty, during his down time he worked out for about an hour on fitness equipment located in the basement of Station 9. The equipment includes universal and free weights, an exercise bike and a Nordic track, and is available to all firefighters on staff. On December 30, 2011, claimant was performing a work-out that involved "dead lifts."[1] While doing a dead lift using approximately 185 pounds of weights, claimant's back popped and his legs started to get numb. Claimant reported the accident to his lieutenant, who reported it to the battalion chief, Eric Bauer. Battalion Chief Bauer sent claimant to St. Francis Hospital for an evaluation. At St. Francis, claimant was admitted and evaluated by Dr. Donald Mead, who took claimant off work three days. Claimant said that took him to his regular four days off, so he was off work for a week.

Claimant believes firefighting is a labor-intensive profession. He testified that there have been numerous instances where he had to help lift patients, including morbidly obese patients, as well as drag hoses and feeder lines. Claimant testified that the dead lift exercise is comparable to his work activity of lifting patients or anything off the ground. Claimant said he lifts weights to develop a level of fitness in order to perform his job.

It was claimant's understanding that some of the fitness equipment had been purchased by respondent, some had been purchased by individuals, and some of it had been purchased by the Firefighters Relief Association. The use of the equipment is not limited to firefighters on duty, but firefighters who are off duty can come in and use it. Claimant had never received a notice from respondent stating he could not work out using the fitness equipment. Claimant said his supervisor also works out regularly. When claimant lifts weights while on duty, he determines when he exercises and how much weight he wants to lift. Claimant acknowledged that firefighters are not required to lift weights. He is not aware of any physical fitness requirements in the contract respondent has with the firefighters.

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[1] P.H. Trans. at 11.

Claimant testified that when he is on duty working the 7 a.m. to 7 a.m. shift, he is on the job the entire time. He can be called out at any time during that period. It is claimant's belief that once he steps into the fire station, everything he does is job related.

Kevin Flory is respondent's shift training officer. Within that role, he is also the safety officer. He stated that before a firefighter can be hired, he or she must pass a physical fitness test, which includes climbing a ladder, lifting weights, and carrying a hose. The physical fitness test is not given to existing firefighters, only new or potentially new hires. Mr. Flory testified there is a physical fitness area in virtually every fire station in Topeka. He stated that physical fitness is a strong point pushed with firefighters in training, and the fitness areas in the stations are available to the firefighters to work out or exercise. Mr. Flory said it is a common practice that firefighters use the fitness facilities. The benefit to the firefighter is improved physical and mental stamina for doing the job.

Mr. Flory explained that municipalities are scored on how the fire departments score in the Insurance Services Officer (ISO) rating. Part of the scoring includes how many training hours the departments have. Under ISO requirements, firefighters should have a minimum of 240 hours a year of training, and 20 minutes a day working out at on-site gym facilities can be counted towards that 240 hours. Mr. Flory admitted there is no penalty to the firefighter if the 240 hours are not met, but the ISO rating for respondent could be lowered, causing an increase in the public's fire insurance premiums. It is not required that the firefighters do physical fitness as part of their ISO 240 hours; it is just one of the categories that are available to meet the 240 hours.

Jack Collie is employed by respondent as a division chief. He oversees training for the fire department. He was unaware of any requirement that firefighters maintain a physical fitness program. However, he acknowledged that physical fitness is encouraged by respondent for firefighters. He believed that most of the fire stations have an area designated for fitness equipment or for the firefighters to work out. Those facilities are available to all firefighters for workout purposes. A firefighter can choose to work out while he or she is on duty.

Jackie Russell is respondent's human resources director. She stated that respondent does not have a fitness requirement for firefighters, nor is there a fitness requirement in respondent's contract with the firefighters. Respondent's contract with the firefighters does not require respondent to furnish fitness equipment to firefighters. Ms. Russell testified that the weight equipment involved in claimant's accident had not been furnished by respondent. The equipment was not owned or maintained by respondent. Ms. Russell was advised that about 15 years ago respondent purchased some Aerodyne bicycles and Nordic Track ski machines and placed them in fire stations, but most of those machines are no longer in service. Ms. Russell spoke with the chief, deputy chief and training chief and was advised there was no designated time for physical fitness.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(h) states:

''Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508 states in part:

(d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.

. . . .

(f)(1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(C) The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the duty did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

(g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

In *Kindel*,[2] the Kansas Supreme Court stated:

> The two phrases arising "out of" and "in the course of" employment, as used in our Workers Compensation Act, K.S.A. 44–501 et seq., have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service. [Citations omitted.]

In *Bryant*,[3] the Kansas Supreme Court stated:

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[2] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[3] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 596, 275 P.3d 255 (2011).

> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the [*sic*] whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement–bending, twisting, lifting, walking, or other body motions–but looks to the overall context of what the worker was doing–welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[5]

ANALYSIS

Respondent acknowledges that claimant's accident and injury occurred in the course of his employment because it happened during his regular work shift and on the premises where respondent required him to be.[6] Claimant was "on the clock," that is, he was being paid at the time he was injured. The issue is whether the activity claimant was engaged in, lifting weights, was a task related to his normal job duties or that respondent specifically instructed him to perform.

Both parties cite, and the ALJ discusses in her Order, the Board's decision in *Flower*.[7] That case was decided under an earlier version of K.S.A. 44-508. Nevertheless, the definition of "arising out of and in the course of employment" formerly contained in K.S.A. 44-508(f) and now contained in K.S.A. 2011 Supp. 44-508(f)(3)(C) has not changed. What has changed or occurred since *Flower* was decided is the approach our Kansas Supreme Court has instructed us to use when interpreting our Kansas workers

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[4] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[5] K.S.A. 2011 Supp. 44-555c(k).

[6] Respondent's Brief at 7 (filed Sept. 10, 2012).

[7] *Flower v. City of Junction City*, Docket No. 189,684, 1998 WL 100183 (Kan. WCAB Feb. 19, 1998) (*aff'd* by *Flower v. City of Junction City*, No. 80,801, Court of Appeals unpublished decision filed March 12, 1999); but see *McIntosh v. City of Wichita*, Docket No. 265,500, 2001 WL 1191766 (Kan. WCAB Sept. 27, 2001) (*aff'd* by *McIntosh v. City of Wichita*, No. 90,921, Court of Appeals unpublished opinion filed April 2, 2004).

compensation statutes, that is, to use what is commonly referred to as strict construction. In *Bergstrom*,[8] the Kansas Supreme Court stated:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.
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> A history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound.

Unless the statute is ambiguous, the test is not what did the Legislature intend, but what does the plain language of the statute mean.[9] The first question is whether the claimant was engaged in a recreational activity when he was injured. Claimant's job is that of a firefighter, specifically an apparatus operator. When on a call, he also performs functions of an EMT, providing rescue and medical assistance to injured persons. At the time of his injury, claimant was lifting weights. He was not out on a call as a first responder to a fire, medical emergency or any other duty of an apparatus operator, firefighter or rescuer. As such, claimant was engaged in a recreational activity. Activities that are organized, encouraged and supervised by the employer may not fall within the purview of a recreational and social activity.[10] While this activity was allowed, even encouraged, it was not required. And while it obviously benefitted both claimant and his employer, it was neither a task that resulted from the performance of claimant's normal job duties, nor was it a task claimant was specifically instructed to perform. Accordingly, claimant's injury did not arise out of his employment as that phrase is used in the Kansas Workers Compensation Act.

CONCLUSION

Claimant has failed to prove that his accident and injury arose out of his employment with respondent.

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[8] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, Syl. ¶ 1, 2, 214 P.3d 676 (2009).

[9] *Douglas v. Ad Astra Information Systems*, 42 Kan. App. 2d 441, 454-59, 213 P.3d 764 (2009) (Green, J. dissenting).

[10] See *Hizey v. MCI*, 39 Kan. App. 2d 609, 616, 181 P.3d 583, *rev. denied* 286 Kan. 1177 (2008).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca A. Sanders dated August 1, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Matthew R. Bergmann, Attorney for Claimant
mbergmann@fuflaw.com
smolt@fuflaw.com

Matthew S. Crowley, Attorney for the Self-Insured Respondent
matt@lbc-law.com

Rebecca A. Sanders, Administrative Law Judge